No. 17-530

IN THE

Supreme Court of the United States

WISCONSIN CENTRAL LTD.; GRAND TRUNK WESTERN RAILROAD COMPANY; AND ILLINOIS CENTRAL RAILROAD COMPANY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

BRIEF FOR PETITIONERS

RICHARD F. RILEY JR.
WILLIAM J. MCKENNA
DAVID T. RALSTON JR.
JONATHAN W. GARLOUGH
FOLEY & LARDNER LLP
321 North Clark Street
Suite 2800
Chicago, IL 60654-5313
(312) 832-4500

THOMAS H. DUPREE JR.
Counsel of Record
RAJIV MOHAN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue NW
Washington, DC 20036
(202) 955-8500
tdupree@gibsondunn.com

Counsel for Petitioners

QUESTION PRESENTED

Whether stock that a railroad transfers to its employees is taxable under the Railroad Retirement Tax Act, 26 U.S.C. § 3231(e)(1).

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all the parties to the proceeding below.

Pursuant to this Court's Rule 29.6, undersigned counsel states that petitioners Wisconsin Central Ltd., Grand Trunk Western Railroad Company, and Illinois Central Railroad Company are all indirect wholly-owned subsidiaries of Canadian National Railway Company, a publicly-traded corporation.

TABLE OF CONTENTS

Page

BRIEF FOR PETITIONERS 1
OPINIONS BELOW 1
JURISDICTION 1
STATUTORY PROVISION INVOLVED 1
STATEMENT 2
SUMMARY OF ARGUMENT 16
ARGUMENT 20
I. Transfers Of Corporate Stock Are Not "Money Remuneration" Under The RRTA 20
A. The Plain Meaning Of "Money Remuneration" Excludes Transfers Of Stock 21
B. The Broader Context Of The Internal Revenue Code Confirms That "Money Remuneration" Does Not Include Stock 30
C. The Recent Exemptions To Section 3231 Do Not Transform Stock Into "Money" 33
D. The Plain-Language Interpretation Gives Meaning To The Limiting Word "Money" And Respects The Textual Differences Between The RRTA And FICA 39
II. The IRS Regulation Does Not Support The Government And Does Not Deserve Deference 47
CONCLUSION 50

ADDENDUM

Page

Excerpted portion of the Railroad Retirement Tax Act, 26 U.S.C. § 3231(e) 1a

Excerpted portion of the Federal Insurance Contributions Act, 26 U.S.C. § 3121(a) 8a

TABLE OF AUTHORITIES

Page(s)

Cases

Advocate Health Care Network v. Stapleton,
137 S. Ct. 1652 (2017) 44

Alton R.R. Co. v. R.R. Ret. Bd.,
16 F. Supp. 955 (D.D.C. 1936) 8, 42

Barnhart v. Sigmon Coal Co.,
534 U.S. 438 (2002) 29

BNSF Ry. Co. v. United States,
775 F.3d 743 (5th Cir. 2015) 29

In re Boyle's Estate,
37 P.2d 841 (Cal. Ct. App. 1934) 24

Burgess v. United States,
553 U.S. 124 (2008) 45, 48

Burlington N. & Santa Fe Ry. Co. v. White,
548 U.S. 53 (2006) 42

Carcieri v. Salazar,
555 U.S. 379 (2009) 21, 34

Chevron U.S.A., Inc. v. NRDC,
467 U.S. 837 (1984) 14, 48

Chicago & N.W. Ry. Co. v. United Transp. Union,
402 U.S. 570 (1971) 46

Commissioner v. LoBue,
351 U.S. 243 (1956) 25

Commissioner v. Soliman
506 U.S. 168 (1993) 24

Conn. Nat. Bank v. Germain,
503 U.S. 249 (1992) 32, 48

Emery Bird Thayer Dry Goods Co. v. Williams,
107 F.2d 965 (8th Cir. 1939) 22

Helvering v. Credit Alliance Corp.,
316 U.S. 107 (1942) 24, 25

Henson v. Santander Consumer USA Inc.,
137 S. Ct. 1718 (2017) 43, 47

Hisquierdo v. Hisquierdo,
439 U.S. 572 (1979) 9

In re Hokulani Square,
776 F.3d 1083 (9th Cir. 2015) 22

Houston & Texas Central Railroad Co. v. Texas,
177 U.S. 66 (1900) 22

Lamie v. U.S. Trustee,
540 U.S. 526 (2004) 33

Michigan v. EPA,
135 S. Ct. 2699 (2015) 48, 49

N. Haven Bd. of Educ. v. Bell,
456 U.S. 512 (1982) 43

N.J. Transit Policemen's Benev. Ass'n v. N.J. Transit Corp.,
806 F.2d 451 (3d Cir. 1986) 40

Nat'l Ass'n of Home Builders v. Defs. of Wildlife,
551 U.S. 644 (2007) 35

Nestle Holdings v. Commissioner of Internal Revenue,
94 T.C. 803 (1990) 25, 33

Posadas v. Nat'l City Bank of N.Y.,
296 U.S. 497 (1936) 35

Puerto Rico v. Franklin Cal. Tax-Free Trust,
136 S. Ct. 1938 (2016) 21

R.R. Ret. Bd. v. Alton R.R. Co.,
295 U.S. 330 (1935) 7

Railway Exp. Agency, Inc. v. Virginia,
347 U.S. 359 (1954) 22

Russello v. United States,
464 U.S. 16 (1983) 42

Sandifer v. U.S. Steel Corp.,
134 S. Ct. 870 (2014) 21, 29, 34, 41

Standard Office Bldg. Corp. v. United States,
819 F.2d 1371 (7th Cir. 1987).....45

Union Pacific R.R. Co. v. United States,
865 F.3d 1045 (8th Cir. 2017).....4, 18, 20, 23, 28
34, 35, 36, 37, 38

United States v. Atl. Research Corp.,
551 U.S. 128 (2007).....39

United States v. Phila. Nat'l Bank.,
374 U.S. 321 (1963).....34

United States v. Quality Stores,
134 S. Ct. 1395 (2014).....36

United States v. Ressam,
553 U.S. 272 (2008).....43

United States v. Smith,
756 F.3d 1179 (10th Cir. 2014).....43

Util. Air Reg. Grp. v. EPA,
134 S. Ct. 2427 (2014).....49

Statutes

26 U.S.C. § 61(a).....14

26 U.S.C. § 118(c).....32

26 U.S.C. § 119(b).....38, 39

26 U.S.C. § 170(g).....32

26 U.S.C. § 306(c).....32

26 U.S.C. § 317(a) 32

26 U.S.C. § 461(f) 32

26 U.S.C. § 465(c) 32

26 U.S.C. § 1001(b) 33

26 U.S.C. § 3121(a) 3, 9, 18, 37, 39, 41, 44

26 U.S.C. § 3121(b) 7, 19, 45, 49

26 U.S.C. § 3201(a)-(b) 9, 20

26 U.S.C. § 3221(a)-(b) 9, 20

26 U.S.C. § 3231(a)-(b) 45

26 U.S.C. § 3231(e) 1, 2, 8, 9, 10, 13, 18, 20, 23, 33, 36, 38, 39, 40, 43

45 U.S.C. §§ 51-60 7

45 U.S.C. §§ 151-162 7

45 U.S.C. §§ 231-231v 10

45 U.S.C. § 231b(a) 9

45 U.S.C. § 231b(b) 10

49 U.S.C. § 20(1) (1934) 26

Pub. L. No. 271, 74th Cong., 1st Sess. § 811(a), 49 Stat. 620 (1935) 6

Pub. L. No. 400, 74th Cong., 1st Sess. § 1(d), 49 Stat. 974 (1935) 42

24 Stat. 379 26

48 Stat. 1283 7

49 Stat. 639 41

49 Stat. 967 8

50 Stat. 307 ..... 8, 10

50 Stat. 435 ..... 7, 8, 40

53 Stat. 1387 7

60 Stat. 722 7

118 Stat. 1418 ..... 10, 38

Regulatory Materials

26 C.F.R. § 1.422-5(c) 37

26 C.F.R. § 31.3231(e)-(1) 12, 19, 47, 49

26 C.F.R. § 301.6311-1 33

26 C.F.R. § 301.6311-2 33

26 C.F.R. § 410.5 (1938) 11, 26, 27, 47

26 C.F.R. § 410.6 (1938) 11

Internal Revenue Service, *Update of Railroad Retirement Tax Act Regulations*, 58 Fed. Reg. 28,366 (May 13, 1993) 11, 49

Notice 2014-21, *IRS Virtual Currency Guidance*, 2014-16 I.R.B. 938 33

Rev. Ruling 76-350 ..... 17, 33

Legislative Materials

Senate Report No. 818, 75th Cong., 1st Sess. (June 15, 1937) 6, 26

House Report No. 1071, 75th Cong., 1st Sess. (June 21, 1937) 6, 26

138 Cong. Rec. S1362-02 (Feb. 7, 1992) 10, 46

Joint Committee on Taxation, *General Explanation of Tax Legislation Enacted in the 108th Congress* (May 2005) 10, 37

Other Authorities

1 Murray Latimer, Industrial Pension Systems in the United States and Canada (1933) 4, 5, 6, 8

Alfred M. Skolnick, *Restructuring the Railroad Retirement System*, 38 Soc. Sec. Bull. 23 (Apr. 1975) 9

The Atchison, Topeka and Santa Fe Pension System, Railway Age (Jan. 4, 1907) 5

Black's Law Dictionary (3d ed. 1933) 21

Bouvier's Law Dictionary (1934) 22

Financial Accounting Standards Board, Statement of Financial Accounting Standards No. 23 (2004) 28

John W. Wood, The Historical Atlas of North American Railroads (2007) 4

Kevin Whitman, *An Overview of the Railroad Retirement Program*, 68 Soc. Sec. Bull. 41 (2008) 6, 7, 8, 46

Loren Gatch, *Local Money in the United States During the Great Depression*, in 26 Essays in Econ. & Bus. Hist. 47-48 (2008) 27

Nat'l Indus. Conf. Bd., *Employee Stock Purchase Plans in the United States* (1928) 5, 27

Patrick W. Seburn, *Evolution of Employer-Provided Defined Benefit Pensions*, Monthly Labor Review (Dec. 1991) 5

Railroad Retirement Handbook 8, 41

RRB Bureau of the Actuary, Tax Rates & Maximum Taxable Earnings 46

Webster's Collegiate Dictionary (4th ed. 1934) 21

Webster's New Int'l Dictionary (2d ed. 1934) 21

BRIEF FOR PETITIONERS

OPINIONS BELOW

The Seventh Circuit's opinion (Pet. App. 1a) is reported at 856 F.3d 490. The Seventh Circuit's order denying rehearing or rehearing en banc (Pet. App. 14a) is not reported. The order and opinion of the district court granting summary judgment (Pet. App. 16a) is reported at 194 F. Supp. 3d 728.

JURISDICTION

The Seventh Circuit entered its judgment on May 8, 2017, and denied petitioners' timely petition for rehearing or rehearing en banc on July 12, 2017. The petition for a writ of certiorari was filed on October 6, 2017, and granted on January 12, 2018. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Railroad Retirement Tax Act, 26 U.S.C. § 3231(e)(1), provides, in relevant part:

> **(e) Compensation**—For purposes of this chapter—
>
> > **(1)** The term "compensation" means any form of money remuneration paid to an individual for services rendered as an employee to one or more employers.

Section 3231(e) is reproduced in full at the back of this brief, Add. 1a, as are relevant provisions of the Federal Insurance Contributions Act, 26 U.S.C. § 3121(a), Add. 8a.

STATEMENT

This case presents the question whether the transfer of corporate stock by a railroad to its employees constitutes "money remuneration" under the Railroad Retirement Tax Act (RRTA), 26 U.S.C. § 3201 et seq.

The RRTA imposes a payroll tax on both railroad employers and employees, with the proceeds used to pay retirement and disability benefits. The RRTA taxes "compensation," which it defines as "any form of money remuneration paid to an individual for services rendered as an employee to one or more employers." 26 U.S.C. § 3231(e)(1).

Petitioners are railroads that issued stock options to their employees. When the employees exercised the options and received the stock, petitioners paid RRTA taxes, but sought refunds on the basis that the stock was not "money remuneration" and hence was not taxable. The IRS denied the refunds and a divided Seventh Circuit panel sided with the government. The court appeared to recognize that the word "money" refers to mediums of exchange, and that stock may not have been considered money when the RRTA was enacted in 1937. Pet. App. 4a. But it then asserted, without citing any legal or economic authority to support the point, that today stock has become the "practical equivalent" of money and therefore is taxable as "money remuneration." *Id.*

The Seventh Circuit departed from traditional methods of statutory interpretation and reached an incorrect conclusion. This is a plain-language case that can and should be resolved based on the text of the statute: Stock is not money. Whereas stock can

be bought and sold for money, it is not a generally accepted medium of exchange—and therefore is not money itself. That common-sense conclusion is confirmed by considering the RRTA's "money remuneration" standard in light of the tax code as a whole. The 1939 version of the Internal Revenue Code—which treated money and stock as different things—is a powerful indicator that when Congress used the phrase "money remuneration" in the RRTA, it intended to confine the RRTA's tax base to remuneration in cash or an equivalent medium of exchange.

That understanding is also consistent with the RRTA's historical context and purpose. Whereas most employers pay and withhold taxes under the Federal Insurance Contributions Act (FICA), Congress from the beginning has exempted railroads and railroad employees from FICA, and instead made them subject to the RRTA. The same Depression-era Congress that enacted the RRTA enacted FICA. But Congress established very different tax bases for the two statutes. Whereas the RRTA taxes "compensation," which it defines as "money remuneration," FICA taxes "wages," which it defines as "*all* remuneration for employment, including the cash value of all remuneration (including benefits) *paid in any medium other than cash*." 26 U.S.C. § 3121(a) (emphasis added).

The difference in language reflects the congressional purpose that, in creating a railroad retirement system separate and distinct from the Social Security/FICA system that governs other employers, Congress intended to tax only a *subset* of the total remuneration railroad employees received. That approach was consistent with the practice that

had long existed in the industry. Since the nineteenth century, railroads had provided their employees with pensions based on salary, not stock. By mirroring the pension structure that existed at the time of the Great Depression, the RRTA enabled a smooth transition from a private pension system to a government-sponsored one.

The Eighth Circuit recently decided the very question presented here. Based on a careful examination of the statute's text, structure and purpose, the court held that stock transfers do not constitute "money remuneration" under the RRTA. *See Union Pacific R.R. Co. v. United States*, 865 F.3d 1045 (8th Cir. 2017).

This Court should confirm what the statutory text and common sense make clear—because money refers to a medium of exchange, stock is not money—and reverse the judgment below.

A. The Railroad Retirement Tax Act

1. Railroads have played a unique role in American history. From the first track laid in 1830 near Baltimore, to the golden spike of 1869 that connected the eastern and western rail systems to form a transcontinental rail network, railroads shaped the development and destiny of our nation. *See generally* John W. Wood, The Historical Atlas of North American Railroads (2007).

By the beginning of the twentieth century, railroads had assumed a dominant position in American industry and employed more than one million workers throughout the nation. Railroads typically paid their workers a base salary on a monthly or annual basis. *See* 1 Murray Latimer, Industrial Pension Systems in the United States and

Canada, at 20 (1933). In addition, they often provided in-kind benefits, including meals, transportation, and lodging. Some railroads also gave their employees company stock, or the opportunity to buy company stock. *See* Nat'l Indus. Conf. Bd., *Employee Stock Purchase Plans in the United States* 81, 208 (1928).

In addition to these various forms of remuneration, railroads provided their employees with pensions. In this regard, as in many others, the railroads were pioneers. They were among the first American industries to ensure their employees' retirement security by providing annuities to employees who had reached a specified age with a specified length of service. *See* Latimer at 20.

The nuances of individual pensions differed by the employing railroad. But as a general matter, whereas railroad employees received remuneration in a variety of ways—including their base salary, a bonus, and in-kind benefits ranging from food and lodging to company stock and other non-monetary property—the amount of the annuity was typically based on the employee's regular paycheck earnings over the course of his or her career. *See* Latimer at 20 (pensions based on workers' "salaries"); *id.* at 21 (railroad pensions measured by "average annual pay"); *id.* at 22-35, 106-12, 133-38; Patrick W. Seburn, *Evolution of Employer-Provided Defined Benefit Pensions*, Monthly Labor Review 17 (Dec. 1991) (pensions based on workers' "average salary over a specific period"); The Atchison, Topeka and Santa Fe Pension System, Railway Age, at 15 (Jan. 4, 1907) (explaining that railroad pensions are calculated with respect to "average monthly pay").

Basing pensions on the employee's regular pay ensured both fairness and ease of administration. Regular pay yielded predictable amounts of post-

retirement pensions. *See* House Report No. 1071, 75th Cong., 1st Sess. at 3 (June 21, 1937) (estimating future RRTA tax revenue based on the reported "pay roll" of railroad employers); Senate Report No. 818, 75th Cong., 1st Sess. at 3 (June 15, 1937) (same). By contrast, pension payments did not reflect irregularly-provided in-kind benefits, or any purchases of company stock, which could be difficult to calculate and lead to disputes over valuation. *See* Latimer at 102 ("In determining the amount of pension to which a retiring worker will be entitled, the establishment of fixed standards is as important as in setting up the conditions for retirement; only in this way can discrimination be avoided, the procedure be routinized and cost be calculated.").

2. By the late 1920s, more than 80 percent of railroad employees worked for railroads with existing pension plans. Kevin Whitman, *An Overview of the Railroad Retirement Program*, 68 Soc. Sec. Bull. 41, 41 (2008). But the railroads were struggling to meet their pension obligations, and as the 1930s dawned, "the Great Depression drove the already unstable railroad pension system into a state of crisis." *Id.*

The crisis was not confined to the railroad industry. Millions of Americans, particularly older workers approaching retirement or who had already retired, faced an uncertain future. Aiming to ensure that American workers enjoyed a stable and secure retirement, Congress took action to create a federal pension system. But rather than enact a single system, Congress proceeded on two separate tracks. It enacted the Social Security Act, which provided retirement benefits funded by a payroll tax through the statute that came to be known as FICA. *See* Pub. L. No. 271, 74th Cong., 1st Sess. § 811(a), 49 Stat. 620

(1935). And it enacted a separate, railroad-only statute that provided retirement benefits funded by a payroll tax through the statute that came to be known as the RRTA. *See* 50 Stat. 435.[1] Because railroads had a separate retirement system, Congress exempted railroads from the Social Security system. *See* 50 Stat. at 439-40; 26 U.S.C. § 3121(b)(9).

Congress created a separate railroad retirement system for several reasons. First, the planned Social Security system would not cover work performed before 1937, so it would provide no relief for the many railroad workers with accrued pension rights that were in jeopardy. *See* Whitman at 41. Second, Social Security was not scheduled to begin paying benefits for years, so it would not help the railroad workers in need of immediate relief. *Id.*

The decision to create distinct retirement systems was consistent with Congress' historic practice of enacting railroad-specific legislation reflecting the railroads' unique role in our nation's history and economy. In 1908, for example, Congress had enacted the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, to govern employee injury claims against railroads. And in 1926, it had enacted the Railway Labor Act, 45 U.S.C. §§ 151-162, to govern labor relations in the railroad industry.

Congress' effort to create a railroad retirement system got off to a rocky start. Its first attempt, *see* 48 Stat. 1283, was promptly struck down as unconstitutional. *See R.R. Ret. Bd. v. Alton R.R. Co.*,

---

[1] The RRTA was originally known as the Carriers Taxing Act; it was renamed the RRTA in 1946. *See* 60 Stat. 722. FICA, originally enacted as Title VIII of the Social Security Act, was transferred in 1939 to the Internal Revenue Code. *See* 53 Stat. 1387.

295 U.S. 330 (1935). Its second attempt, *see* 49 Stat. 967, met a similar fate. *See Alton R.R. Co. v. R.R. Ret. Bd.*, 16 F. Supp. 955 (D.D.C. 1936).

Congress made a third attempt—this time through legislation reflecting a negotiated compromise between railroad labor and management. *See* 50 Stat. 307 (1937); 50 Stat. 435 (1937). Perhaps to increase its chances of survival under the scrutiny of a judiciary that at the time was skeptical of new federal mandates that exceeded the terms of private contracts, the RRTA mirrored the existing pension arrangements in the railroad industry. Railroad pensions were based on an employee's regular pay, rather than on all the different types of remuneration the employee received. *See* Latimer at 20-21.

This version of the RRTA survived. Nearly 50,000 existing railroad pensioners were immediately transferred into the railroad retirement system and began receiving federal pensions, *see* Whitman at 42; Railroad Retirement Handbook at 2, while many more active railroad workers would become eligible for benefits upon their retirement.

3. The RRTA levies a tax on employee "compensation." Although Congress has amended the statute over the years, it has kept in place the original statutory definition of "compensation" as "any form of money remuneration paid to an individual for services rendered as an employee to one or more employers." Those words appear in the United States Code today unchanged from the statute's original text. *See* 50 Stat. 435, 436; 26 U.S.C. § 3231(e)(1). Railroad employers must pay an excise tax equal to a specified percentage of their employees' "compensation," and also withhold a specified percentage of that compensation as the employees' share of the tax. *See*

26 U.S.C. § 3201(a)-(b) (tax on railroad employees); *id.* § 3221(a)-(b) (tax on railroad employers).

The railroad retirement system differs from the Social Security/FICA retirement system in key respects. For one thing, the tax bases are very different. Whereas the RRTA taxes employee "compensation," defined as "money remuneration," FICA taxes "wages," defined as "all remuneration . . . including the cash value of all remuneration (including benefits) paid in any medium other than cash." *See* 26 U.S.C. § 3231(e)(1) (RRTA); *id.* § 3121(a) (FICA).

The benefits provided by the two retirement systems differ as well. Railroad workers have always enjoyed more robust benefits, including larger monthly payments, more generous disability pay and a lower retirement age, among other things. In 1974, the railroad retirement system was changed to address the unfairness of some retirees (who had worked for both a railroad and a non-railroad employer) receiving dual benefits under the railroad retirement program *and* Social Security. *See* Alfred M. Skolnik, *Restructuring the Railroad Retirement System*, 38 Soc. Sec. Bull. 23, 26-27 (Apr. 1975). But rather than abolish the railroad retirement program and put all retirees into Social Security, Congress maintained railroad retirement as a separate program and created two "tiers" of railroad benefits, both linked to the amount of employee "compensation." *See Hisquierdo v. Hisquierdo*, 439 U.S. 572, 574-75 (1979). Under the new scheme, Tier 1 benefits are generally analogous to Social Security benefits. *See* 45 U.S.C. § 231b(a). Tier 2 benefits, which are the benefits provided by the original version of the statute, have no Social Security analogue; these

benefits are generally comparable to a private pension system based on earnings and career service. *See* 45 U.S.C. § 231b(b).[2]

Over the years, Congress has added various exemptions to RRTA "compensation." *See* 26 U.S.C. § 3231(e)(1)-(12). In 2004, Congress added an exemption for "[q]ualified stock options." *Id.* § 3231(e)(12). The new language provided that "[t]he term 'compensation' shall not include any remuneration on account of a transfer of a share of stock to any individual pursuant to an exercise of an incentive stock option (as defined in section 422(b)) or under an employee stock purchase plan (as defined in section 423(b)), or any disposition by the individual of such stock." *Id.* (internal numbering omitted). The need for this amendment arose because of confusion about whether employers had to withhold employment taxes in connection with employees' exercise of "incentive stock options"—a particular type of option that receives favorable treatment under the tax code. *See* Joint Committee on Taxation, *General Explanation of Tax Legislation Enacted in the 108th Congress* at 218-19 (May 2005). Accordingly, Congress inserted into FICA an exemption for these options—and placed the same exemption in three other federal employment tax statutes, including the RRTA. *See* 118 Stat. 1418 (2004).

Throughout the 80-plus years since their enactment, Congress has maintained the distinction between the RRTA and FICA. Although legislation that would have conformed RRTA "compensation" to FICA "wages" has been introduced, *see* 138 Cong. Rec.

---

[2] Railroad retirement benefits are provided under the Railroad Retirement Act, which was enacted simultaneously with the RRTA. *See* 50 Stat. 307, now codified at 45 U.S.C. §§ 231-231v.

S1362-02, S1474 (Feb. 7, 1992), Congress has rejected that change and preserved railroad retirement as a separate and distinct system.

B. The IRS's Shifting Interpretation

The government's understanding of "money remuneration" has evolved.

Soon after the RRTA's enactment, the IRS (then the Bureau of Internal Revenue) issued a regulation interpreting the word "compensation" to include "all remuneration in money, or in something which may be used in lieu of money (scrip and merchandise orders, for example), which is earned by an individual for services performed as an employee for one or more employers, or as an employee representative." 26 C.F.R. § 410.5 (1938). The regulation further provided that "compensation" includes "[s]alaries, wages, commissions, fees, bonuses, and any other remuneration in money or in something which may be used in lieu of money." *Id.* § 410.6(a).

The IRS's original regulation remained on the books until 1994. That year the IRS issued a new regulation to achieve what it characterized as "the congressional goal of making the [FICA and RRTA] systems parallel." Internal Revenue Service, *Update of Railroad Retirement Tax Act Regulations*, 58 Fed. Reg. 28,366, 28,367 (May 13, 1993). The new regulation—which remains on the books today—provides that RRTA "compensation" has "the same meaning as the term wages in section 3121(a) [the FICA definition of "wages"], determined without regard to section 3121(b)(9) [the provision exempting railroads from FICA taxation], *except as specifically limited by the Railroad Retirement Tax Act* . . . or

regulation." 26 C.F.R. § 31.3231(e)-1(a)(1) (emphasis added).

C. Petitioners' Stock Option Plan

The three petitioners—Wisconsin Central Ltd., Grand Trunk Western Railroad Company, and Illinois Central Railroad Company—are subsidiaries of Canadian National Railway Company (CN) with significant operations in the midwestern United States and the Mississippi Valley. All are rail carriers subject to the RRTA. JA 36.

Petitioners have issued stock options to their employees since the mid-1990s. JA 45. Each option gave the employee the right to purchase one share of CN stock at a fixed exercise price—the "strike" price—equal to CN's publicly traded stock price as of the date the option was granted. JA 41. Thus, the value of an option—unlike the value of a cash salary—depends on the future performance of the company, as reflected in its publicly-traded share price, which may increase or decrease once the option is granted. JA 46.

Petitioners issued stock options because stock options incentivize employees in a way that money payments do not. JA 45-47. Stock options "encourage[] employees to work harder for the company, because the better the company does the more valuable its stock is." Pet. App. 3a. Petitioners designed their stock option plans to align the economic interests of their employees with the growth of the CN business enterprise as a whole, as part of what it called the Canadian National Railway Company Management Long-Term Incentive Plan. JA 45-46. The stock options generally had a ten-year term, terminable early if the employee ceased employment with a CN affiliate. JA 40-41, 46-47. Most of the options could be exercised at almost any

time during the ten-year term, although some could be exercised only if CN achieved specified financial benchmarks. JA 40-45.

When exercising options, employees could choose to pay for their shares in different ways. JA 41-42. Some paid the strike price, income-tax withholdings and administrative costs in cash, while others directed the transfer agent to sell enough shares to cover those costs. *Id.* Many employees chose to transfer their shares to their personal brokerage account to be held as a stock investment, while others chose to sell their shares at the time the options were exercised. In fact, the majority of the shares received by employees were kept as investments. *See* Pet. CA7 Separate Appendix at 45. Regardless of the method a particular employee chose, petitioners transferred only stock—not money—to their employees.

The stock options at issue in this case were "nonqualified" options. That is to say, they were not "qualified stock options" as defined in 26 U.S.C. § 3231(e)(12). Petitioners issued these options to many of their executives and managers, as well as to some of their rank-and-file employees. JA 47. Most recipients chose to hold their stock options for a lengthy period—on average, more than six years—and even when they exercised the options, many who ultimately sold the stock held it for a lengthy period before selling. JA 47-48; Pet. CA7 Separate Appendix at 45.

D. Proceedings Below

1. In 2014, petitioners filed the instant action seeking refunds of RRTA taxes they had paid or withheld when stock was transferred to their employees, pursuant to the exercise of stock options, between 2006 and 2013. Pet. App. 17a-20a.

Petitioners contended that the stock transfers did not constitute "money remuneration" under the RRTA and hence were not taxable. *Id.* at 19a-20a.

Petitioners claimed both the employer tax paid by themselves, as well as the amount they withheld from the employees and paid to the IRS on the employees' behalf. The total amount of the requested refunds—approximately $13 million—is less than 2 percent of the total RRTA taxes petitioners and their employees paid during those years (roughly $952 million). *See* District Court D.E. 1-1 (14-cv-10243); D.E. 1-1 (14-cv-10244); D.E. 1-1 (14-cv-10246) (forms showing overall RRTA taxes paid).[3]

The parties cross-moved for summary judgment based on a stipulated factual record. Pet. App. 17a. The district court sided with the government, denying the refunds. The court held that the term "money remuneration" was ambiguous and that the government's interpretation was entitled to deference under *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). Pet. App. 37a-38a.

2. A divided panel of the Seventh Circuit affirmed. Noting that the RRTA was enacted during the Great Depression, the court acknowledged that "[m]aybe stock then wasn't a form of money remuneration" and thus would not have been taxable under the original meaning of the statute. Pet. App. 3a-4a. However, the court reasoned, "there is no

[3] There is no dispute that the stock options, upon exercise, gave rise to taxable income to the employees subject to *income* tax withholding. *See* 26 U.S.C. § 61(a) (levying income tax on "all income from whatever source derived"). This case presents the distinct question whether the stock *also* constitutes "money remuneration" subject to *RRTA* withholding. The income taxation of stock is not at issue in this case.

reason to think that the framers and ratifiers of the Act meant money remuneration to be limited to cash even if, as was eventually to happen, stock became its practical equivalent, just as today 100 dimes is the exact monetary equivalent of a $10 bill." *Id.* at 4a. In short, the court explained, "sheep may have once been a form of money; now stock is." *Id.*

The court deemed the Internal Revenue Code of 1939—which it acknowledged "treats 'money' and 'stock' as different concepts"—to be "of limited help here." Pet. App. 4a. Instead, the court looked to the exemption for qualified stock options, which was enacted in 2004, nearly 70 years after the RRTA was enacted, as "signal[ing]" the "equivalence of stock to cash." *Id.* Finally, the court decided that, regardless of the statutory text, "[t]he government's position also makes good practical sense." *Id.* at 5a.

Judge Manion dissented. Focusing on the statutory text, he explained that "our job is to interpret the Act as it would have been understood by people at the time it was enacted." Pet. App. 6a. He therefore concluded that "the plain language of the statute's definition of 'compensation' does not cover stock or stock options." *Id.* Judge Manion rejected the panel majority's emphasis on practicality, explaining that "we must interpret the RRTA using normal principles of statutory interpretation." *Id.* at 7a. Using that approach, he looked to the contemporary Webster's Second Dictionary in concluding that the plain meaning of "money" when the statute was enacted was "media of exchange issued by a recognized authority"—a meaning that clearly excluded stock. *Id.* at 8a. Judge Manion also focused on the textual difference between the RRTA and FICA, emphasizing that "[w]e must give effect to

Congress's distinction between 'money remuneration' and 'all remuneration.'" *Id.* at 7a.

3. Petitioners timely sought rehearing, which was denied over a dissent by Judge Manion. Pet. App. 14a-15a.

SUMMARY OF ARGUMENT

I. Petitioners' transfer of stock to their employees did not amount to "money remuneration" and therefore was not taxable "compensation" under the RRTA.

A. Statutory text must be given its plain meaning as of the time the statute was enacted. The plain meaning of "money," as used in the RRTA, is a generally accepted medium of exchange. That meaning is confirmed by Depression-era dictionaries and contemporaneous examples of usage in judicial opinions.

Stock is not "money" under this definition. It is not commonly used as a medium of exchange. No one buys groceries or pays their rent with stock. While stock can be bought and sold for money, it is not itself money. This Court and the Tax Court have repeatedly distinguished between stock and money. The committee reports accompanying the RRTA—as well as the original IRS regulation interpreting the statute—further confirm the common-sense conclusion that stock is not money.

The court of appeals seemingly agreed with petitioners that "money" is a generally accepted medium of exchange, but it erroneously held that today stock has become the "practical equivalent" of money. The court cited no authority for this surprising conclusion, which is clearly incorrect.

Under the court's reasoning—that stock worth $100 is the same as a $100 bill—the limiting word "money" is drained of meaning, as *anything* that can be sold for value would be "money."

B. The meaning of "money remuneration" is especially clear when the provision is read in context, as part of the Internal Revenue Code. The 1939 version of the Code contains the first codified versions of the RRTA and FICA. It shows, in numerous provisions, that Congress treated "money" and "stock" as different things. Even the court of appeals acknowledged that the 1939 Code—a powerful contemporaneous indicator of what the Depression-era Congress meant when it used the word "money" in a tax statute—"treats 'money' and 'stock' as different concepts." Pet. App. 4a. The modern Internal Revenue Code continues to recognize that stock is not money. And the IRS, which requires taxes to be paid in "money or its equivalent," Rev. Ruling 76-350, does *not* accept payment in stock.

C. The court of appeals mistakenly concluded that, under petitioners' interpretation, various exemptions to "compensation," including an exemption for "qualified stock options," would be rendered surplusage. The court erred in two respects. First, the exemptions were added *decades* after the RRTA—and its "money remuneration" standard—were enacted. These recent exemptions cannot change the original meaning of "money remuneration" as it was written into law in 1937. Moreover, it would be misplaced to conclude that by enacting exemptions aimed at *reducing* taxation under the RRTA, Congress actually *expanded* the RRTA's tax base. Second, the court was wrong in believing that these exemptions would be surplusage under petitioners'

interpretation. As the Eighth Circuit determined, after conducting a careful examination of each exemption, the exemptions encompass transactions that may include cash payments. *See Union Pacific*, 865 F.3d at 1050. With regard to the exemption for "qualified stock options," even the government conceded that "money is sometimes received when a qualified stock option is exercised." *Id.* Thus, petitioners' interpretation would not render the exemptions surplusage. In fact, it is the government's interpretation that would render the key term "money" surplusage.

D. Giving "money" its plain-language meaning respects the statutory text and furthers the congressional purpose of creating a railroad retirement system separate and distinct from FICA. When the same Depression-era Congress enacted both the RRTA and FICA, it used very different language in establishing the statutes' respective tax bases. Whereas the RRTA taxes only "money remuneration," FICA taxes "*all* remuneration for employment, including the cash value of all remuneration (including benefits) *paid in any medium other than cash*." *Compare* 26 U.S.C. § 3231(e)(1) (RRTA), *with* 26 U.S.C. § 3121(a) (FICA, emphasis added). Congress has maintained that same statutory text virtually unchanged for more than 80 years.

This Court should give meaning to the textual difference. The government argued below that the textual difference was "happenstance" because Congress was "rushing," and that "the phrase 'money remuneration' is reasonably construed as meaning merely remuneration." U.S. CA7 Br. at 35. But the stark disparity in language, especially when viewed in light of the statutes' history and purpose, make clear

that Congress' use of "money remuneration" was no accident. The RRTA was modeled on the pre-existing railroad pensions that were based on employees' salary or average annual pay. When enacting FICA, in contrast, Congress was writing on a blank slate. The government seeks to blur the textual differences between the two statutes and achieve what for decades Congress has steadfastly refused to do—conform the RRTA's tax base to FICA's. Giving "money remuneration" its plain-language meaning fulfills the congressional purpose of maintaining railroad retirement as a separate and distinct system, with a narrower tax base than FICA.

II. The IRS regulation does not support the government's position and is not entitled to deference in any event. The regulation purports to give RRTA "compensation" the same meaning as FICA "wages"—"except as specifically limited by the [RRTA]." 26 C.F.R. § 31.3231(e)-(1). The restriction of the RRTA's tax base to "money remuneration," as compared to FICA's "all remuneration," plainly constitutes an RRTA-specific limitation. Thus, the regulation commands the same result as the statute itself: transfers of stock are not taxable.

Even if the regulation could be read the way the government claims—as reflecting the IRS's intent to subject stock transfers to RRTA taxation—it would not be entitled to *Chevron* deference. The words "money remuneration" are not ambiguous and plainly exclude stock transfers. Nor would the regulation be a permissible interpretation, as it expressly disregards the congressional mandate, 26 U.S.C. § 3121(b)(9), that railroads are exempt from FICA taxation.

ARGUMENT

The phrase "money remuneration," as used in the RRTA, does not encompass corporate stock that a railroad transfers to its employees. Because stock is not a generally accepted medium of exchange, it is not money—a conclusion that is reinforced when the statute is read in the context of the Internal Revenue Code as a whole. That the same Depression-era Congress created two retirement systems with different tax bases—"money remuneration" (RRTA) versus "all remuneration" (FICA)—leaves no doubt that this textual difference was a deliberate choice that should be respected rather than ignored.

The court of appeals did not engage in close analysis of the statutory text and did not adhere to the meaning of the words at the time they were written. Instead, it adopted the outcome it thought made "good practical sense," basing its decision on the assertion that stock is the "practical equivalent" of money—a claim for which it provided no authority or citation. Pet. App. 4a-5a. That is not how this Court interprets statutes. As the Eighth Circuit recently concluded, based on a careful examination of the RRTA's text, structure and purpose, stock transfers are *not* "money remuneration." *Union Pacific R.R. Co. v. United States*, 865 F.3d 1045, 1049 (8th Cir. 2017).

I. Transfers Of Corporate Stock Are Not "Money Remuneration" Under The RRTA.

The RRTA taxes the "compensation" of railroad employees, which it defines as "any form of money remuneration paid to an individual for services rendered as an employee to one or more employers." *See* 26 U.S.C. §§ 3201(a)-(b), 3221(a)-(b) (imposing tax on "compensation"); *id.* § 3231(e)(1) (defining "compensation"). Because stock is not "money," it is

not "compensation," and hence is not taxable under the RRTA.

A. The Plain Meaning Of "Money Remuneration" Excludes Transfers Of Stock.

Statutory interpretation "begins with the language of the statute itself," and where the statute's language is plain, "that is also where the inquiry should end." *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1946 (2016) (quotation marks and citation omitted). This Court has consistently held that statutory text must be given its plain meaning as of the time the statute was written. *See Carcieri v. Salazar*, 555 U.S. 379, 388 (2009) ("We begin with the ordinary meaning of the [words], as understood when the [statute] was enacted."). Indeed, "[i]t is a fundamental canon of statutory construction that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 876 (2014) (quotation marks and citation omitted). Here, the ordinary meaning of the word "money"—both at the time the RRTA was enacted and today—does not include corporate stock.

1. "Money" Is A Generally Accepted Medium Of Exchange.

The ordinary meaning of "money" is a generally accepted medium of exchange. Dictionaries from the 1930s confirm this meaning. *See* Webster's New Int'l Dictionary 1583 (2d ed. 1934) ("*Webster's Second*") ("money" means currency "issued by recognized authority as a medium of exchange"); Webster's Collegiate Dictionary 630 (4th ed. 1934) (money means coins and metals "issued as a medium of exchange"); Black's Law Dictionary 1200 (3d ed. 1933)

("In its more popular sense, 'money' means any currency, tokens, bank-notes, or other circulating medium in general use as the representative of value."); Bouvier's Law Dictionary 814 (1934) ("money" includes "coins" and other "common medium[s] of exchange in a civilized nation"). *See also In re Hokulani Square*, 776 F.3d 1083, 1085-86 (9th Cir. 2015) ("[D]ictionaries mostly agree that [the word 'moneys'] refers to a generally accepted medium of exchange.").

These dictionary definitions are consistent with judicial usage. This Court has stated that "money . . . is a medium of exchange." *Railway Exp. Agency, Inc. v. Virginia*, 347 U.S. 359, 365 (1954). In *Houston & Texas Central Railroad Co. v. Texas*, 177 U.S. 66, 83-85 (1900), this Court held that treasury warrants were not "money" because they were usable only in certain limited transactions, and did not serve as a medium of exchange in commerce generally. The Court explained that the warrants lacked "a fitness for general circulation in the community as a representative and substitute for money in the common transactions of business." *Id.* at 84.

Lower courts have followed suit. As one court of appeals explained, in a case decided shortly after the RRTA's enactment, "[t]he sole function of money is as a necessary medium of exchange in all commerce which has passed the barter stage." *Emery Bird Thayer Dry Goods Co. v. Williams*, 107 F.2d 965, 971 (8th Cir. 1939).

Although the court below and the Eighth Circuit in *Union Pacific* divided over whether stock is "money," every judge on both panels seemingly *agreed* that the word "money" in the RRTA refers to a generally accepted medium of exchange. In the

decision below, the panel majority explained that "[t]he dictionary definition of money may remain constant while the instruments that comprise it change over time: sheep may once have been a form of money; now stock is." Pet. App. 4a. The dissent agreed that money refers to "media of exchange issued by a recognized authority." *Id.* at 8a. For its part, the Eighth Circuit looked to Depression-era dictionaries and other "contemporary legal authorities" in holding that the "ordinary, common meaning" of the word "money" in the RRTA is a "generally accepted medium of exchange." *Union Pacific*, 865 F.3d at 1049 (quotation marks omitted).

2. Stock Is Not A Generally Accepted Medium Of Exchange.

a. Corporate stock is not "money" because it is not a generally accepted medium of exchange. While stock can be bought and sold for money, it is not itself money, even when it has a readily-ascertainable market value. Stock is not commonly exchanged for goods or services. No one buys their groceries with stock and no one pays their rent with stock. Although stock is sometimes issued or transferred when one corporation acquires another, it is not a *generally or commonly accepted* medium of exchange in the United States. This was true in the 1930s and it remains true today.

The phrase "any form of money remuneration" in the RRTA, 26 U.S.C. § 3231(e)(1), thus includes remuneration paid in a commonly recognized governmental currency, such as dollars. The words "any form of" extend the statute's coverage to the variety of ways that money remuneration may be effected—including through paper notes and coins, checks, wire transfers, electronic direct deposits, and

so forth, and whether paid as salary, hourly wages, commissions, bonuses, or on any other basis. But the statute does *not* encompass remuneration in stock or other investment property, even when that property has a determinable market value and can be bought or sold for money. At the end of the day, if the remuneration does not take the form of *money*, it is not taxable under the RRTA.

This natural reading of "money" makes sense in the context of a statute concerning the compensation of railroad workers during the Great Depression. A railroad worker who was promised that he would be paid money for a day's hard labor would have been shocked and disappointed if, at the end of his workday, the foreman handed him a sheaf of nearly worthless shares of corporate stock. That would not have squared with his "ordinary, everyday" understanding of what money was. *See Commissioner v. Soliman*, 506 U.S. 168, 174 (1993) ("In interpreting the meaning of the words in a revenue Act, [courts] look to the ordinary, everyday senses of the words.") (quotation marks omitted). As one Depression-era court explained, "[t]here is no doubt that the word 'money' when taken in its ordinary and grammatical sense does not include corporate stocks." *In re Boyle's Estate*, 37 P.2d 841, 842 (Cal. Ct. App. 1934).

b. Two tax cases from this Court confirm the common-sense conclusion that stock is not money. In *Helvering v. Credit Alliance Corp.*, 316 U.S. 107 (1942), decided just five years after the RRTA's enactment, this Court considered a statute governing the tax treatment of distributions of "stock or securities." *Id.* at 112 (citing 49 Stat. 1688). The Court held this provision inapplicable "because the

distribution here was in property and money and not in stock or securities." *Id.*

In *Commissioner v. LoBue*, 351 U.S. 243 (1956), the Court again treated stock and money as different things. *LoBue* presented the question whether an employee realized a taxable gain for income tax purposes when he exercised an employer-provided stock option and purchased stock. The Court held that in light of the "broad coverage" of the income tax statute—which encompassed "*all* gains except those specifically exempted"—the stock purchase was taxable. *Id.* at 246-47 (emphasis added and quotation marks omitted). In reaching this conclusion, the Court expressly distinguished between stock and money, explaining that because the income tax uses such a broad tax base, "[i]t makes no difference that the compensation is paid in stock rather than in money." *Id.* at 247. For the RRTA, of course, it *does* make a difference because the tax base is limited to remuneration in "money."

The Tax Court and the IRS itself have drawn the same distinction between stock and money. In *Nestle Holdings v. Commissioner of Internal Revenue*, 94 T.C. 803 (1990), the Tax Court rejected the idea that preferred stock was "money" or a "money equivalent." The court explained that preferred stock has a "great dissimilarity to money in any practical sense," in that it is not "in the nature of money" and is not "convertible into cash at face amount as a matter of certainty" because "its market value can vary greatly over short periods of time." *Id.* at 814-15 (quotation marks omitted). The court noted that the IRS itself "concede[d] that the preferred stock is not in fact money but property other than money." *Id.* at 815.

c. The meaning of "money remuneration" is further illuminated by the House and Senate committee reports accompanying the RRTA, and by the IRS's original regulation implementing the statute. All of these sources make clear that stock transfers are not "money remuneration."

The committee reports reflect Congress' understanding that the term "money remuneration" referred to an employee's average pay, or salary. Both the House and Senate report explain that the RRTA's tax on "compensation" is based on the railroad employer's "pay roll," as memorialized in the railroads' annual reports to the Interstate Commerce Commission. *See* House Report No. 1071, 75th Cong., 1st Sess. at 3 (June 21, 1937); Senate Report No. 818, 75th Cong., 1st Sess. at 3 (June 15, 1937). The railroads' annual reports were required to "show in detail . . . the number of employees and *the salaries paid* each class" of employee. 24 Stat. 379, 386; 49 U.S.C. § 20(1) (1934) (emphasis added). Congress, in turn, used the "pay roll" numbers to project future RRTA revenue. *See* House Report at 3; Senate Report at 3. Thus, the reports establish that Congress envisioned "money remuneration" as referring to an employee's salary, or average pay—and *not* to any in-kind remuneration provided by the employer, such as food, transportation, or transfers of stock or other property.

The original IRS regulation, which was enacted soon after the RRTA's passage and kept on the books for more than 50 years, confirms this understanding. The regulation defined "compensation" to include "all remuneration in money, or in something which may be used in lieu of money (scrip and merchandise orders, for example)." 26 C.F.R. § 410.5(a) (1938).

The regulation further provided that "compensation" included "[s]alaries, wages, commissions, fees, bonuses, and any other remuneration in money or in something which may be used in lieu of money." *Id.* § 410.6(a). These examples do *not* include stock, or any type of investment property like stock. That is a telling omission, particularly given that many railroads at that time provided stock to their employees. *See* Nat'l Indus. Conf. Bd., *Employee Stock Purchase Plans in the United States* 81, 208 (1928).[4]

3. The Court Of Appeals' Ruling That Stock Is The "Practical Equivalent" Of Money Is Flawed.

The Seventh Circuit appeared to agree that the word "money" in the RRTA refers to a generally accepted medium of exchange. Pet. App. 4a. The court concluded, however, that stock (in its view) has

---

[4] During the Great Depression, scrip was "private currency issued by corporations . . . to meet payrolls and which was redeemable in the company store." Loren Gatch, *Local Money in the United States During the Great Depression*, in 26 Essays in Econ. & Bus. Hist. 47-48 (2008). In the Seventh Circuit, the government conceded that "scrip," as the word appeared in the 1938 regulation, referred to "company-issued certificates" that employees could use in lieu of cash "to purchase merchandise at a company store." U.S. CA7 Br. 37. The government has now changed its position. Having uncovered a subordinate definition from *Black's Law Dictionary*, the government's new interpretation is that scrip can "encompass shares in a public company." Pet. Opp. 10. The government had it right the first time: The context in which the word "scrip" appears—joined with "merchandise orders," and appearing alongside other items used as mediums of exchange, rather than investment property—leaves no doubt that it is referring to credit used to buy merchandise at the company store. It does not refer to shares in a public corporation.

now become the "practical equivalent" of money and hence is taxable "compensation." *Id.* The court declared that just as sheep were a common medium of exchange long ago, corporate stock plays that role today. *Id.*

The court of appeals was mistaken. Stock has not become the "practical equivalent" of money. "Even stocks with readily ascertainable share prices are not 'money' because they are not mediums of exchange." *Union Pacific*, 865 F.3d at 1052. Whereas it may once have been a common practice to exchange sheep for goods and services, it is not a common practice to exchange stock for goods and services today. Moreover, while some stocks have a readily-ascertainable share price, not all do, and stock that is not publicly traded can be difficult to value and hard to sell. *See* Financial Accounting Standards Board, Statement of Financial Accounting Standards No. 23 at 183-84 (2004) (explaining that the "difficulty" of valuing shares of a nonpublic entity arises from "the lack of frequent observation of the fair value of its shares" and concluding that it may not be "possible for a nonpublic entity to reasonably estimate the fair value of its equity share options").

The court of appeals' reasoning—that stock is money because "there is no significant economic difference" between receiving $1,000 in cash and $1,000 in stock (Pet. App. 3a-4a)—ignores the text of the RRTA. Section 3231 does not tax all remuneration, or remuneration through anything with a market value; it taxes remuneration in "money." There is a large universe of items with a market value that, like stock, are regularly bought and sold. Cars, houses, land, baseball cards, comic books, bottles of fine wine—all of these things have a

market value and it may be that "there is no significant economic difference," Pet. App. 3a, between receiving one of these items and receiving its market value in the form of cash. Yet that does not transform all of these items into "money." The majority offered no limiting principle to its interpretation, under which virtually *everything* is "money."

The Seventh Circuit's declaration that treating stock as money "makes good practical sense," Pet. App. 5a, misconceives the court's task when interpreting statutes. It is the duty of the court to enforce the law as Congress wrote it. Even if the court thought that a differently-written statute would make more "practical sense," or be preferable from a policy perspective, that is a task properly left to Congress. "The role of this Court is to apply the statute as it is written—even if we think some other approach might accord with good policy." *Sandifer*, 134 S. Ct. at 878 (quotation marks omitted). In short, the Court "will not alter the text to satisfy the policy preferences of the Commissioner." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002).[5]

---

[5] In appearing to recognize that "money" refers to mediums of exchange, the Seventh Circuit agreed with the Eighth Circuit, but parted ways with the Fifth Circuit—the only other court of appeals to have considered this issue. *See BNSF Ry. Co. v. United States*, 775 F.3d 743 (5th Cir. 2015). Although the Fifth Circuit acknowledged that "most" dictionaries define money as a medium of exchange, it ultimately deemed the word ambiguous and deferred to the government's interpretation. *Id.* at 752, 757. The Fifth Circuit was too quick to give up and declare ambiguity. The phrase "money remuneration" has an ordinary plain-language meaning that was well established at the time of the RRTA's enactment.

B. The Broader Context Of The Internal Revenue Code Confirms That "Money Remuneration" Does Not Include Stock.

When the phrase "money remuneration" is viewed in context—and read alongside other provisions of the Internal Revenue Code—it confirms the plain-language interpretation that corporate stock is not "money." The 1939 version of the Code provides strong evidence of what the Depression-era Congress meant when it used the word "money" in a tax context. It shows that Congress treated "stock" and "money" as different things for tax purposes. The same is true today: The modern Code repeatedly distinguishes between money and stock.

1. The 1939 Internal Revenue Code Treated "Money" And "Stock" As Different Things.

That corporate stock is not "money" under the RRTA is further confirmed by the 1939 Internal Revenue Code. That version of the Code was adopted soon after the enactment of the RRTA and FICA, and represents the first codified version of the modern federal revenue laws. The 1939 Code repeatedly distinguished between "money," on the one hand, and "other property," including stock, on the other. Even the court of appeals acknowledged that the 1939 Code "treats 'money' and 'stock' as different concepts." Pet. App. 4a.

The 1939 Code leaves no doubt that the Depression-era Congress did not consider stock to be money:

- Section 27(d) described "stock of the corporation" as "property other than money."

- Section 115(f)(2) recognized that stock is not money, explaining that when a corporate distribution is payable "either (A) in [the company's] stock . . . or (B) in money or any other property (including its stock or in rights to acquire its stock)," then the distribution is taxable "regardless of the medium in which paid."
- Section 115(h)(1) distinguished between distributions of "money" and corporate stock, providing that a corporate distribution is not considered a "distribution of earnings or profits" if "no gain to [the] distributee from the receipt of . . . stock or securities, property or money, was recognized by law."
- Section 372(b) discussed transfers "of property or money in addition to . . . stock or securities."
- Section 1857 defined a safe deposit box as any receptacle "used for the safe-keeping or storage of jewelry, plate, *money*, specie, bullion, *stocks*, bonds, *securities*, valuable papers of any kind, or other valuable personal property" (emphasis added).

Another indicator of meaning in the 1939 Code is that Congress considered "money" as having a fixed value, whereas "property other than money" has a fluctuating value. For example, Section 111(b) defined the "amount realized" for capital gains purposes as "the sum of any money received plus the fair market value of the property (other than money) received." Likewise, Section 112(c), which governed like-kind exchanges, provided that if the transferor received assets in the form of "other property or money," the taxable portion of the transaction was measured by "the sum of such money and the fair

market value of such other property." These provisions further illustrate that Congress viewed stock—which has a fluctuating rather than fixed value—as "property other than money" for tax purposes.

Had Congress wished to tax stock transfers under the RRTA, it would not have used the words "money remuneration." Instead, it would have said "all remuneration," or "remuneration in money or property," just as it did elsewhere in the Code. But it said none of those things. This Court normally presumes that Congress "means in a statute what it says there," *Conn. Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992), and when Congress said that only "money remuneration" was taxable under the RRTA, it meant that only money remuneration was taxable—not remuneration in money or other property, or remuneration generally.

2. Even Today, Congress And The IRS Decline To Treat Stock As Money For Tax Purposes.

The modern Internal Revenue Code continues to maintain the distinction between money and stock. For example, dividends are issued in "money" and "distributed in lieu of [ ] stock." 26 U.S.C. § 306(c)(2)-(3). When Congress wants to encompass stock within a tax provision, it typically uses a phrase such as "property other than money." *See, e.g.*, *id.* § 118(c)(1) (contributions to capital may be made in "money or other property"); *id.* § 170(g)(2)(B) (same); *id.* § 317(a) (defining "property" for corporate redemption and dividend purposes as including both "money" and "securities"); *id.* § 461(f) (transfers of "money or other property" for tax accounting purposes); *id.* § 465(c)(7)(D)(ii) ("property other than money").

Indeed, in *Nestle Holdings*, 94 T.C. at 814-15, the IRS and the Tax Court both recognized that stock was *not* "money," but "property other than money," for purposes of determining gain for income-tax purposes under 26 U.S.C. § 1001(b).

Current IRS regulations reinforce this conclusion. The IRS allows taxes to be paid only through "money or its equivalent"—a definition the agency interprets to *exclude* stock. *See* Rev. Ruling 76-350; 26 C.F.R. §§ 301.6311-1 & 301.6311-2 (allowing taxes to be paid by check, money order, credit card or debit card). In fact, the IRS has determined that even virtual currencies, such as Bitcoin, are not "money" for federal tax purposes, apparently because their market value fluctuates. *See* Notice 2014-21, *IRS Virtual Currency Guidance*, 2014-16 I.R.B. 938. If property that *is* used as a medium of exchange is not "money" because of a fluctuating fair market value, it follows *a fortiori* that stock, which also has a fluctuating fair market value but is *not* used as a medium of exchange, cannot be "money" either.

C. The Recent Exemptions To Section 3231 Do Not Transform Stock Into "Money."

In an effort to bolster its conclusion, the Seventh Circuit relied on several exemptions to "compensation," including the exemption concerning QSOs, or "[q]ualified stock options." 26 U.S.C. § 3231(e)(12). In the court's view, those exemptions "support[ ] an inference" that "money remuneration" cannot be limited to cash or medium-of-exchange remuneration, because otherwise the exemptions would be superfluous. Pet. App. 4a-5a. Of course, the canon against surplusage cannot be invoked as a way to create ambiguity from otherwise clear text, *see Lamie v. U.S. Trustee*, 540 U.S. 526, 536 (2004), and

here, the unambiguous meaning of "money" excludes stock.

The exemptions do not transform stock into "money" for two main reasons. First, the exemptions were added to the statute *decades* after the RRTA was enacted. The QSO exemption, for example, was added in 2004. For that reason, the exemptions cannot shed light on the intent of the Depression-era Congress. The meaning of the term "money remuneration" was fixed in 1937 and subsequent amendments cannot change that meaning absent an express or implied repeal. Second, the court of appeals misread the exemptions, believing that they applied *only* to non-cash benefits. In fact, each of the exemptions encompasses money payments as well as nonmonetary benefits. *See Union Pacific*, 865 F.3d at 1050-51. Giving "money remuneration" its plain meaning is therefore consistent with the rest of the statute, including the exemptions.

1. Later-Enacted Exemptions Cannot Change The Original Meaning Of "Money Remuneration."

In determining the meaning of "money remuneration," this Court looks to the meaning of the words at the time Congress enacted the RRTA. *See Sandifer*, 134 S. Ct. at 876; *Carcieri*, 555 U.S. at 388. If in 1937 "money remuneration" meant remuneration through a generally accepted medium of exchange, that is still what it means today. Later-enacted amendments cannot change that original meaning, absent a repeal. For that reason, "[t]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States v. Phila. Nat'l Bank.*, 374 U.S. 321, 348-49 (1963).

The exemptions do not purport to change the meaning of "money remuneration." None of the exemptions makes an express repeal, and the demanding standards for an implied repeal are not met here. Implied repeal can occur only "[w]here provisions in the two acts are in irreconcilable conflict," and where "the later act covers the whole of the subject of the earlier one and is clearly intended as a substitute." *Posadas v. Nat'l City Bank of N.Y.*, 296 U.S. 497, 503 (1936). Moreover, the later Congress must demonstrate a "clear and manifest" intent to achieve repeal through the new legislation. *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 662-63 (2007). Here, there is no conflict between the original definition and the exemptions. Nor can there be any suggestion that the exemptions were intended as a substitute for the original definition. Accordingly, the addition of the later exemptions did not impliedly repeal the original meaning of "money remuneration" as remuneration through currency or a generally accepted medium of exchange. *See Union Pacific*, 865 F.3d at 1052.

Construing these recent exemptions, as the government does, to support an interpretation of "money remuneration" broader than its original meaning fails for another reason. Congress added all of these exemptions with the purpose of *reducing* taxation under the RRTA. It would be perverse to conclude that, in doing so, it actually *expanded* the RRTA's tax base.

2. Because All Of The Exemptions Encompass Some Form Of Money Payment, They Are Not Surplusage.

The Seventh Circuit took the view that certain exemptions would be unnecessary if petitioners'

reading of "money remuneration" were correct. That is mistaken, because all of the exemptions in question, including the QSO exemption, encompass transactions that may include cash payments. Thus, the exemptions are *not* surplusage when "money" is given its plain meaning of a generally accepted medium of exchange. In fact, it is the *government's* interpretation that would render the word "money" in "money remuneration" surplusage.

The government urged the court of appeals to view this case as analogous to *United States v. Quality Stores*, 134 S. Ct. 1395, 1400 (2014), in which the Court observed that an exemption for severance payments in FICA "would be unnecessary were severance payments in general not within FICA's definition of 'wages.'" But that argument rests on a "false premise in the RRTA context." *Union Pacific*, 865 F.3d at 1050. "None of the exemptions . . . will be rendered superfluous under [petitioners'] reading of the statute because each can include payments consistent with a medium-of-exchange interpretation of 'money.'" *Id.*

The court of appeals reasoned that because the statute exempts remuneration on account of the exercise of "qualified stock options," 26 U.S.C. § 3231(e)(12), remuneration on account of *nonqualified* stock options (like those at issue here) must be considered "money remuneration" because otherwise the exemption would be surplusage. Pet. App. 4a-5a. But as the Eighth Circuit recognized, "cash payments sometimes accompany the exercise of a stock option." *Union Pacific*, 865 F.3d at 1050. Indeed, "[t]he government does not dispute . . . that money is sometimes received when a qualified stock option is exercised." *Id.* This can happen in several

ways. First, some employers transfer cash to the employee in addition to transferring the stock. *See* 26 C.F.R. § 1.422-5(c) (employers may pay employees "additional compensation, in cash or property," at the time they exercise incentive stock options). Second, sometimes the number of shares an employee is entitled to acquire is not a whole number. In that circumstance, the employee may receive cash in lieu of a fractional share. *See Union Pacific*, 865 F.3d at 1050. In short, because there are multiple circumstances in which an employee receives cash remuneration "on account of" exercising a stock option, the QSO exemption is *not* surplusage under a medium-of-exchange interpretation of "money."

The history of the QSO exemption further negates the inference drawn by the court of appeals. Congress had long excluded QSOs from the income tax, but "the IRS had been inconsistent" as to whether the employer's withholding obligation under FICA was triggered. Joint Committee on Taxation, *General Explanation of Tax Legislation Enacted in the 108th Congress* at 218-19 (May 2005). Congress accordingly sought "to clarify the treatment of [such] stock options for employment tax . . . purposes." *Id.* The resulting congressional debate focused on FICA—understandably so, as the Social Security/FICA system covers far more people than does the railroad retirement system. *See id.* at 219 (explaining that the purpose of the legislation was to "provide[ ] specific exclusions for FICA and FUTA [the Federal Unemployment Tax Act] wages"); *id.* at 219 n.378 (noting, in a footnote, the application to the RRTA). Thus, when Congress added the QSO exemption to FICA, *see* 26 U.S.C. § 3121(a)(22), it put virtually identical language into the other federal employment tax statutes, including the federal income tax

withholding statute, FUTA, and the RRTA, presumably to avoid raising an inference that a failure to include a corresponding exemption in one of these statutes could be interpreted as meaning that QSOs *were* taxable under that statute. *See* 118 Stat. 1418, 1458 (2004). In preparing a rifle-shot fix to a discrete question that had arisen concerning tax withholding for *qualified* stock options under FICA, Congress plainly had no intention of changing the law governing *nonqualified* options under the RRTA.

The remaining exemptions are unhelpful to the government for the same reason: Like the QSO exemption, they all encompass cash payments, and thus are entirely consistent with a medium-of-exchange interpretation of "money." The exemption for health and disability insurance, 26 U.S.C. § 3231(e)(1)(i), excludes "any *payment*" made to, or on behalf of, an employee on account of sickness, accident, or hospitalization. *Id.* (emphasis added). "Since this exemption covers cash payments made to an employee, it would not be rendered superfluous by interpreting 'money' to mean mediums of exchange." *Union Pacific*, 865 F.3d at 1051. The exemption for employee achievement awards, 26 U.S.C. § 3231(e)(5), applies to "any benefit provided to or on behalf of an employee if at the time such benefit is provided it is reasonable to believe that the employee will be able to exclude such benefits from income under section 74(c), 108(f)(4), 117, or 132." As the Eighth Circuit recognized, "each of those sections includes a medium-of-exchange component." *Union Pacific*, 865 F.3d at 1051. Finally, the exemption for meals and lodging, 26 U.S.C. § 3231(e)(9), cross-references 26 U.S.C. § 119, which provides that payments from an employer to an employee are excluded from taxable

income where the employee is required to pay back the money in exchange for meals. *Id.* § 119(b)(3).[6]

Even if—contrary to all of the above—one of the exemptions did not encompass money payments, Congress sometimes creates "a degree of surplusage" in order to perform a "clarifying function." *United States v. Atl. Research Corp.*, 551 U.S. 128, 137 (2007); *see also* Joint Committee on Taxation report, *supra*, at 218-19 (stating that the exemption was intended "to clarify" the tax treatment of QSOs). By inserting various exemptions into the RRTA over the years, Congress did not purport to modify the underlying RRTA tax base. Rather, it simply removed any doubt about the statute's application in particular circumstances.

D. The Plain-Language Interpretation Gives Meaning To The Limiting Word "Money" And Respects The Textual Differences Between The RRTA And FICA.

Giving the words "money remuneration" their ordinary, plain-language meaning respects the critical textual differences between the RRTA and FICA. The same Congress that enacted the RRTA enacted FICA. Yet it established very different tax bases for the two retirement regimes: The RRTA taxes "money remuneration," 26 U.S.C. § 3231(e)(1), whereas FICA taxes "all remuneration," *id.* § 3121(a).

The government acknowledged the textual differences in the two statutes, but urged the court of

---

[6] The Seventh Circuit cited two other exemptions, both of which encompass cash payments. *See* 26 U.S.C. § 3231(e)(6) (educational benefits); *id.* § 3231(e)(10)-(11) (medical and health savings plans).

appeals to treat the word "money" in the RRTA as surplusage. *See* U.S. CA7 Br. at 35 ("the phrase 'money remuneration' is reasonably construed as meaning merely remuneration"). That is the wrong approach. This Court should give meaning to the limiting word "money" rather than delete it. Doing so not only respects the text of the statute, but furthers the congressional purpose of creating a separate retirement system for railroad employees with a narrower tax base than FICA's.

1. Congress Acted Deliberately In Limiting The RRTA Tax Base To "Money" Remuneration.

Rather than create a single retirement system for all employers and employees, the New Deal Congress created two distinct systems—one for railroads and one for all other industries. That approach was consistent with Congress' traditional practice of enacting railroad-specific legislation in light of the railroads' unique role in the history of our nation. "Historically, Congress has elected to regulate the relationship of railroad workers with their employees in a series of statutes independent of those which apply to other industrial workers and their employers." *N.J. Transit Policemen's Benev. Ass'n v. N.J. Transit Corp.*, 806 F.2d 451, 454 (3d Cir. 1986).

In establishing the tax bases for the two retirement systems, Congress used language that survives and appears in the United States Code to this day:

- The RRTA taxes "compensation," defined as "money remuneration" for services rendered. *See* 50 Stat. at 436, now codified at 26 U.S.C. § 3231(e)(1).

- FICA, in contrast, taxes "wages," defined as "all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash." *See* 49 Stat. 639, now codified at 26 U.S.C. § 3121(a).

The "historical context surrounding [the RRTA's and FICA's] passage," *Sandifer*, 134 S. Ct. at 877, explains why Congress chose to use different language in the two payroll-tax statutes. Congress designed the RRTA as a replacement for the existing railroad pension plans that were based on salary or average pay rather than non-monetary compensation. *See* pp. 5-6 *supra*. Modeling the new railroad retirement system on the existing industry pension structure helped ensure a smooth transition as the private pensions were transferred to the new federal railroad retirement program. *See* Railroad Retirement Board Handbook at 2 (noting that nearly 50,000 railroad pensions were immediately transferred); *id.* (explaining the purpose of the RRTA was to "continue and broaden *the existing* railroad programs") (emphasis added). For that reason—and perhaps to assuage a judiciary that was often unreceptive to New Deal legislation, particularly legislation that imposed substantial new obligations on industry—Congress carefully conformed its railroad retirement system to the pre-existing pension structure in the industry. Rather than create a new pension system out of whole cloth, Congress essentially federalized the railroads' pension obligations.

When enacting FICA, in contrast, Congress was writing on a blank slate. It was establishing a retirement-security program for many industries that did not have existing pension programs. Because

Congress was not replacing existing pensions, it was free to design from scratch a brand-new retirement system, including a different tax base—and it did, by taxing "all" remuneration rather than just "money" remuneration.

This Court "normally presume[s] that, where words differ as they differ here, Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006) (citation omitted). That presumption applies with particular force here. Congress adopted the "money remuneration" standard used in the RRTA *the very same month*—August 1935—that it adopted the "all remuneration" standard used in FICA.[7] The fact that in a single month, Congress created two retirement systems—but used different language to describe the tax bases—underscores that its use of "money remuneration" was a conscious and purposeful choice.

The government ascribes the textual differences to "happenstance," surmising that because Congress was "rushing to enact legislation in the crisis of the Great Depression" its choice of language was inadvertent. U.S. CA7 Br. at 54. But the Court should "not presume to ascribe this difference to a simple mistake in draftsmanship." *Russello v. United States*, 464 U.S. 16, 23 (1983). The *same* Congress used *different* words in establishing the respective tax

---

[7] The phrase "money remuneration" appeared for the first time in the 1935 version of the RRTA. *See* Pub. L. No. 400, 74th Cong., 1st Sess. § 1(d), 49 Stat. 974 (1935). That version was enjoined, *see Alton R.R. Co. v. R.R. Ret. Bd.*, 16 F. Supp. 955 (D.D.C. 1936), and Congress used the same "money remuneration" language in the 1937 version of the RRTA, which survives to this day.

bases for the two retirement systems. The tax base is not a peripheral provision but rather a central element of a retirement tax-and-benefit program. *See United States v. Ressam*, 553 U.S. 272, 277 (2008) ("While it is possible that [a linguistic difference in two statutes] was inadvertent, that possibility seems remote given the stark difference that was thereby introduced into the otherwise similar texts.").

2. The Difference In Language Between The RRTA And FICA Conveys A Difference In Meaning.

This Court should respect the statutory text and treat the linguistic differences between the RRTA and FICA as conveying a difference in meaning. *See Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1723 (2017) ("[W]e presume differences in language like this convey differences in meaning."). The RRTA and FICA are both retirement-focused statutes enacted at approximately the same time by the same Congress. Both impose a payroll tax on employers and employees to fund retirement benefits. But these high-level similarities serve to underscore, rather than elide, the textual difference in the statutes' respective tax bases. "[A]lthough two statutes may be similar in language and objective, we must not fail to give effect to the differences between them." *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 530 (1982). Indeed, "it is axiomatic that such notable linguistic differences in two otherwise similar statutes are normally presumed to convey differences in meaning." *United States v. Smith*, 756 F.3d 1179, 1186 (10th Cir. 2014) (Gorsuch, J.).

There are two notable linguistic differences between the RRTA's and FICA's respective tax bases. First, the RRTA taxes "money remuneration." 26

U.S.C. § 3231(e)(1). FICA, in contrast, taxes "all remuneration," *id.* § 3121(a). This difference shows that Congress intended to establish a narrower tax base for the RRTA by taxing only a *subset* of all the forms of remuneration that railroad employees received. As shown above, this conformed the new federal railroad pension structure to the pre-existing railroad pension structure.

Second, when it enacted FICA, Congress added a critical phrase that it chose *not* to include in the RRTA. In FICA, Congress expressly defined "wages" to "includ[e] the cash value of all remuneration (including benefits) paid *in any medium other than cash*." 26 U.S.C. § 3121(a) (emphasis added). Had Congress intended the RRTA to encompass nonmonetary remuneration, such as stock, it would have included similar language in the RRTA. *See Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1659 (2017) (when Congress does not adopt obvious alternative language, that indicates it did not intend the alternative).

The government's interpretation of the RRTA would nullify these textual differences. This approach is impermissible in most circumstances, but it would be particularly offensive here given that the language the government wants to delete is the very *definition* of the key statutory term. The words "money remuneration" establish what Congress intended the word "compensation" to mean, and a court has no license to reject the RRTA's definition of "compensation" as "money remuneration" and replace it with "all remuneration," as the government expressly urged the court of appeals to do. "When a statute includes an explicit definition, [courts] must

follow that definition." *Burgess v. United States*, 553 U.S. 124, 130 (2008) (quotation marks omitted).

The government's approach also conflicts with 26 U.S.C. § 3121(b)(9), the FICA provision that *exempts* railroad employers and employees from paying FICA taxes. Subsection (b)(9) excludes from FICA "employment" any "service performed by an individual as an employee or employee representative as defined in section 3231." Section 3231, in turn, defines railroad "employers" and "employees." *Id.* § 3231(a)-(b). The government's effort to equate RRTA "compensation" with FICA "wages"—effectively subjecting railroads to the FICA tax structure—would render this provision virtually meaningless.

3. Giving "Money Remuneration" Its Ordinary Meaning Furthers The Congressional Purpose.

Giving "money remuneration" its plain language meaning furthers the congressional purpose in two key respects. It maintains the RRTA's overall structure—a narrower tax base, offset in part by higher tax rates. And it preserves the RRTA as a distinct railroad-only retirement system.

The RRTA's text and history show that Congress intended the RRTA to have a narrower tax base than FICA. For that reason, it adopted the "money remuneration" standard rather than FICA's broad "all remuneration" standard. A narrower tax base makes perfect sense because the RRTA imposes higher tax *rates* than does FICA. *See Standard Office Bldg. Corp. v. United States*, 819 F.2d 1371, 1373 (7th Cir. 1987). In fact, the tax rates can differ substantially. In 2017, for example, railroad employers paid 20.75 percent, and railroad employees paid 12.55 percent of

their compensation, up to the annual compensation caps. Under FICA, in contrast, employers and employees each paid only 7.65 percent of their wages, up to the annual wage caps. *See* RRB Bureau of the Actuary, Tax Rates & Maximum Taxable Earnings, *available at* https://rrb.gov/sites/default/files/2017-11/taxrate_6.pdf. Of course, the RRTA also provides more generous benefits—not just the Tier 1 benefits that are analogous to Social Security, but also the Tier 2 benefits that are analogous to a private pension. In all of these ways, the RRTA's structure differs substantially from FICA's. *See* Whitman at 41 ("[A]lthough the Railroad Retirement program and Social Security share a number of common elements, key differences also exist between the two in areas such as funding and benefit structure."). Petitioners' interpretation of "money remuneration" respects these differences, whereas the government's interpretation, which blurs the textual distinctions between the RRTA and FICA, does not.

Equating RRTA "compensation" with FICA "wages" would frustrate the congressional objective of a distinct, railroad-specific retirement system. Congress enacted railroad retirement as a separate program—and it has maintained it as a separate program for more than 80 years, despite efforts to conform the RRTA's tax base to FICA's. *See* 138 Cong. Rec. S1362-02, S1474 (Feb. 7, 1992). Even though both statutes have been amended many times, Congress has steadfastly preserved the RRTA/FICA distinction, just as it has preserved the definitions of RRTA "compensation" and FICA "wages." In a similar context, this Court has warned against ignoring the differences between railroad-specific statutes and statutes governing other industries. *See Chicago & N.W. Ry. Co. v. United Transp. Union*, 402 U.S. 570,

579 n.11 (1971) (cautioning that "parallels between the [National Labor Relations Act] and the Railway Labor Act, should be drawn with the utmost care and with full awareness of the differences between the statutory schemes").

In the year 2018, the notion of a distinct railroad-only retirement system may seem quaint. "[T]he evolution of [the railroad industry] might invite reasonable disagreements on whether Congress should reenter the field and alter the judgments it made in the past." *Henson*, 137 S. Ct. at 1725. But it is the prerogative of Congress, not the courts, to conform the RRTA to FICA, should it choose to do so.

II. The IRS Regulation Does Not Support The Government And Does Not Deserve Deference.

Soon after the RRTA's enactment, the IRS issued a regulation interpreting "compensation" to include "all remuneration in money, or in something which may be used in lieu of money." 26 C.F.R. § 410.5(a) (1938). It maintained that regulation on the books for more than fifty years.

The agency changed course in 1994. That year, it issued what stands today as its current regulation, which provides that "compensation" has "the same meaning as the term wages in [FICA] . . . *except as specifically limited by the Railroad Retirement Tax Act*." 26 C.F.R. § 31.3231(e)-1 (emphasis added).

The regulation does not support the government's position in this case because the RRTA *does* "specifically limit" what would otherwise be taxable under FICA. Unlike FICA, which applies to "all" remuneration, the RRTA is "specifically limited" to "money" remuneration. Thus, under a

straightforward interpretation of the IRS regulation, it commands the same result as the statute itself: The RRTA's specific limitation must be enforced and stock transfers are not taxable because they are not "money remuneration." Put differently, the only way the regulation supports the government's position is if the word "money" is excised from the statute.

Even if the regulation could plausibly be read the way the government claims, it would not be entitled to deference. It fails *Chevron* step one because Congress has "directly spoken to the precise question at issue." 467 U.S. at 842. As discussed above, the plain meaning of "money remuneration," when considered using traditional tools of statutory construction, does not include stock. "When the words of a statute are unambiguous . . . judicial inquiry is complete." *Germain*, 503 U.S. at 254 (quotation marks omitted).

The words "money remuneration" are unambiguous. Indeed, it would be anomalous to deem the term ambiguous given that it is Congress' definition of "compensation." It is unlikely that Congress, in providing its *own* definition of compensation, actually wished the agency to define the term through regulation. Because "[s]tatutory definitions control the definition of statutory words," *Burgess*, 553 U.S. at 130, there is no basis for deferring to the IRS's regulation here.

The regulation also fails *Chevron* step two because it is not a permissible interpretation of the statute. *See Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) (even under *Chevron*, "agencies must operate within the bounds of reasonable interpretation") (quotation marks omitted). In the agency's view, the words "money remuneration" are not a specific limitation,

whereas the various exemptions are. U.S. CA7 Br. at 42. This interpretive technique is precisely what this Court held agencies may *not* do: "*Chevron* allows agencies to choose among competing reasonable interpretations of a statute; it does not license interpretive gerrymanders under which an agency keeps parts of statutory context it likes while throwing away parts it does not." *Michigan v. EPA*, 135 S. Ct. at 2708.

Moreover, as interpreted by the IRS in this case, the regulation would nullify 26 U.S.C. § 3121(b)(9), which provides that FICA is *inapplicable* to railroads. The regulation states that, subject to specific RRTA limitations, the IRS will treat FICA "wages" as equivalent to RRTA "compensation" "*without regard to section 3121(b)(9).*" 26 C.F.R. § 31.3231(e)-1 (emphasis added). In other words, despite an express statutory mandate that railroads may *not* be taxed based on FICA "wages," the IRS regulation purports to do exactly that—"without regard to" the congressional command. A regulation that declares an express disregard for a statutory provision is plainly unreasonable and contrary to law.

The IRS has asserted that its regulation furthers what it claims to have discerned as "the congressional goal of making the systems parallel," Internal Revenue Service, *Update of Railroad Retirement Tax Act Regulations*, 58 Fed. Reg. 28,366, 28,367 (May 13, 1993). That purported goal is directly contradicted by what Congress said in Section 3121(b)(9), and it is a "core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate." *Util. Air Reg. Grp. v. EPA*, 134 S. Ct. 2427, 2446 (2014). The IRS's attempt to equate RRTA "compensation" and

FICA "wages" is a textbook example of an agency attempting to achieve by regulation what Congress has refused to do through legislation.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

RICHARD F. RILEY JR.
WILLIAM J. MCKENNA
DAVID T. RALSTON JR.
JONATHAN W. GARLOUGH
FOLEY & LARDNER LLP
321 North Clark Street
Suite 2800
Chicago, IL 60654-5313
(312) 832-4500

THOMAS H. DUPREE JR.
Counsel of Record
RAJIV MOHAN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue NW
Washington, DC 20036
(202) 955-8500
tdupree@gibsondunn.com

Counsel for Petitioners

February 2018

ADDENDUM

Railroad Retirement Tax Act
26 U.S.C. § 3231(e)

(e) Compensation

For purposes of this chapter—

(1) The term "compensation" means any form of money remuneration paid to an individual for services rendered as an employee to one or more employers. Such term does not include (i) the amount of any payment (including any amount paid by an employer for insurance or annuities, or into a fund, to provide for any such payment) made to, or on behalf of, an employee or any of his dependents under a plan or system established by an employer which makes provision for his employees generally (or for his employees generally and their dependents) or for a class or classes of his employees (or for a class or classes of his employees and their dependents), on account of sickness or accident disability or medical or hospitalization expenses in connection with sickness or accident disability or death, except that this clause does not apply to a payment for group-term life insurance to the extent that such payment is includible in the gross income of the employee, (ii) tips (except as is provided under paragraph (3)), (iii) an amount paid specifically—either as an advance, as reimbursement or allowance—for traveling or other bona fide and necessary expenses incurred or reasonably expected to be incurred in the business of the employer provided any such payment is identified by the employer either by a separate payment or by specifically indicating the separate amounts where both wages and expense reimbursement or allowance are combined in a single payment, or (iv) any remuneration which would not (if chapter 21 applied to such remuneration) be treated as wages (as defined

in section 3121(a)) by reason of section 3121(a)(5). Such term does not include remuneration for service which is performed by a nonresident alien individual for the period he is temporarily present in the United States as a nonimmigrant under subparagraph (F), (J), (M), or (Q) of section 101(a)(15) of the Immigration and Nationality Act, as amended, and which is performed to carry out the purpose specified in subparagraph (F), (J), (M), or (Q), as the case may be. For the purpose of determining the amount of taxes under sections 3201 and 3221, compensation earned in the service of a local lodge or division of a railway-labor-organization employer shall be disregarded with respect to any calendar month if the amount thereof is less than $25. Compensation for service as a delegate to a national or international convention of a railway labor organization defined as an "employer" in subsection (a) of this section shall be disregarded for purposes of determining the amount of taxes due pursuant to this chapter if the individual rendering such service has not previously rendered service, other than as such a delegate, which may be included in his "years of service" for purposes of the Railroad Retirement Act. Nothing in the regulations prescribed for purposes of chapter 24 (relating to wage withholding) which provides an exclusion from "wages" as used in such chapter shall be construed to require a similar exclusion from "compensation" in regulations prescribed for purposes of this chapter.

(2) Application of contribution bases

(A) Compensation in excess of applicable base excluded

(i) In general

The term "compensation" does not include that part of remuneration paid during any calendar year to

an individual by an employer after remuneration equal to the applicable base has been paid during such calendar year to such individual by such employer for services rendered as an employee to such employer.

(ii) Remuneration not treated as compensation excluded

There shall not be taken into account under clause (i) remuneration which (without regard to clause (i)) is not treated as compensation under this subsection.

(iii) Hospital insurance taxes

Clause (i) shall not apply to—

(I) so much of the rate applicable under section 3201(a) or 3221(a) as does not exceed the rate of tax in effect under section 3101(b), and

(II) so much of the rate applicable under section 3211(a) as does not exceed the rate of tax in effect under section 1401(b).

(B) Applicable base

(i) Tier 1 taxes

Except as provided in clause (ii), the term "applicable base" means for any calendar year the contribution and benefit base determined under section 230 of the Social Security Act for such calendar year.

(ii) Tier 2 taxes, etc.

For purposes of—

(I) the taxes imposed by sections 3201(b), 3211(b), and 3221(b), and

(II) computing average monthly compensation under section 3(j) of the

Railroad Retirement Act of 1974 (except with respect to annuity amounts determined under subsection (a) or (f)(3) of section 3 of such Act), clause (2) of the first sentence, and the second sentence, of subsection (c) of section 230 of the Social Security Act shall be disregarded.

(C) Successor employers

For purposes of this paragraph, the second sentence of section 3121(a)(1) (relating to successor employers) shall apply, except that—

(i) the term "services" shall be substituted for "employment" each place it appears,

(ii) the term "compensation" shall be substituted for "remuneration (other than remuneration referred to in the succeeding paragraphs of this subsection)" each place it appears, and

(iii) the terms "employer", "services", and "compensation" shall have the meanings given such terms by this section.

(3) Solely for purposes of the taxes imposed by section 3201 and other provisions of this chapter insofar as they relate to such taxes, the term "compensation" also includes cash tips received by an employee in any calendar month in the course of his employment by an employer unless the amount of such cash tips is less than $20.

(4)

(A) For purposes of applying sections 3201(a), 3211(a), and 3221(a), in the case of payments made to an employee or any of his dependents on account of sickness or accident disability, clause (i) of the second

sentence of paragraph (1) shall exclude from the term "compensation" only—

(i) payments which are received under a workmen's compensation law, and

(ii) benefits received under the Railroad Retirement Act of 1974.

(B) Notwithstanding any other provision of law, for purposes of the sections specified in subparagraph (A), the term "compensation" shall include benefits paid under section 2(a) of the Railroad Unemployment Insurance Act for days of sickness, except to the extent that such sickness (as determined in accordance with standards prescribed by the Railroad Retirement Board) is the result of on-the-job injury.

(C) Under regulations prescribed by the Secretary, subparagraphs (A) and (B) shall not apply to payments made after the expiration of a 6-month period comparable to the 6-month period described in section 3121(a)(4).

(D) Except as otherwise provided in regulations prescribed by the Secretary, any third party which makes a payment included in compensation solely by reason of subparagraph (A) or (B) shall be treated for purposes of this chapter as the employer with respect to such compensation.

(5) The term "compensation" shall not include any benefit provided to or on behalf of an employee if at the time such benefit is provided it is reasonable to believe that the employee will be able to exclude such benefit from income under section 74(c), 108(f)(4), 117, or 132.

(6) The term "compensation" shall not include any payment made, or benefit furnished, to or for the

benefit of an employee if at the time of such payment or such furnishing it is reasonable to believe that the employee will be able to exclude such payment or benefit from income under section 127.

[(7) Repealed. Pub. L. 113-295, div. A, title II, § 221(a)(19)(B)(v), Dec. 19, 2014, 128 Stat. 4040.]

(8) Treatment of certain deferred compensation and salary reduction arrangements

(A) Certain employer contributions treated as compensation

Nothing in any paragraph of this subsection (other than paragraph (2)) shall exclude from the term "compensation" any amount described in subparagraph (A) or (B) of section 3121(v)(1).

(B) Treatment of certain nonqualified deferred compensation

The rules of section 3121(v)(2) which apply for purposes of chapter 21 shall also apply for purposes of this chapter.

(9) Meals and lodging

The term "compensation" shall not include the value of meals or lodging furnished by or on behalf of the employer if at the time of such furnishing it is reasonable to believe that the employee will be able to exclude such items from income under section 119.

(10) Archer MSA contributions

The term "compensation" shall not include any payment made to or for the benefit of an employee if at the time of such payment it is reasonable to believe that the employee will be able to exclude such payment from income under section 106(b).

(11) Health savings account contributions

The term "compensation" shall not include any payment made to or for the benefit of an employee if at the time of such payment it is reasonable to believe that the employee will be able to exclude such payment from income under section 106(d).

(12) Qualified stock options

The term "compensation" shall not include any remuneration on account of—

(A) a transfer of a share of stock to any individual pursuant to an exercise of an incentive stock option (as defined in section 422(b)) or under an employee stock purchase plan (as defined in section 423(b)), or

(B) any disposition by the individual of such stock.

Federal Insurance Contributions Act
26 U.S.C. § 3121(a)

(a) Wages For purposes of this chapter, the term "wages" means all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash; except that such term shall not include—

(1) in the case of the taxes imposed by sections 3101(a) and 3111(a) that part of the remuneration which, after remuneration (other than remuneration referred to in the succeeding paragraphs of this subsection) equal to the contribution and benefit base (as determined under section 230 of the Social Security Act) with respect to employment has been paid to an individual by an employer during the calendar year with respect to which such contribution and benefit base is effective, is paid to such individual by such employer during such calendar year. If an employer (hereinafter referred to as successor employer) during any calendar year acquires substantially all the property used in a trade or business of another employer (hereinafter referred to as a predecessor), or used in a separate unit of a trade or business of a predecessor, and immediately after the acquisition employs in his trade or business an individual who immediately prior to the acquisition was employed in the trade or business of such predecessor, then, for the purpose of determining whether the successor employer has paid remuneration (other than remuneration referred to in the succeeding paragraphs of this subsection) with respect to employment equal to the contribution and benefit base (as determined under section 230 of the Social Security Act) to such individual during such calendar year, any remuneration (other than

remuneration referred to in the succeeding paragraphs of this subsection) with respect to employment paid (or considered under this paragraph as having been paid) to such individual by such predecessor during such calendar year and prior to such acquisition shall be considered as having been paid by such successor employer;

(2) the amount of any payment (including any amount paid by an employer for insurance or annuities, or into a fund, to provide for any such payment) made to, or on behalf of, an employee or any of his dependents under a plan or system established by an employer which makes provision for his employees generally (or for his employees generally and their dependents) or for a class or classes of his employees (or for a class or classes of his employees and their dependents), on account of—

(A) sickness or accident disability (but, in the case of payments made to an employee or any of his dependents, this subparagraph shall exclude from the term "wages" only payments which are received under a workman's compensation law), or

(B) medical or hospitalization expenses in connection with sickness or accident disability, or

(C) death, except that this paragraph does not apply to a payment for group-term life insurance to the extent that such payment is includible in the gross income of the employee;

[**(3)** Repealed. Pub. L. 98–21, title III, § 324(a)(3)(B), Apr. 20, 1983, 97 Stat. 123]

(4) any payment on account of sickness or accident disability, or medical or hospitalization expenses in connection with sickness or accident

disability, made by an employer to, or on behalf of, an employee after the expiration of 6 calendar months following the last calendar month in which the employee worked for such employer;

(5) any payment made to, or on behalf of, an employee or his beneficiary—

(A) from or to a trust described in section 401(a) which is exempt from tax under section 501(a) at the time of such payment unless such payment is made to an employee of the trust as remuneration for services rendered as such employee and not as a beneficiary of the trust,

(B) under or to an annuity plan which, at the time of such payment, is a plan described in section 403(a),

(C) under a simplified employee pension (as defined in section 408(k)(1)), other than any contributions described in section 408(k)(6),

(D) under or to an annuity contract described in section 403(b), other than a payment for the purchase of such contract which is made by reason of a salary reduction agreement (whether evidenced by a written instrument or otherwise),

(E) under or to an exempt governmental deferred compensation plan (as defined in subsection (v)(3)),

(F) to supplement pension benefits under a plan or trust described in any of the foregoing provisions of this paragraph to take into account some portion or all of the increase in the cost of living (as determined by the Secretary of Labor) since retirement but only if such supplemental payments are under a plan which is treated as a

welfare plan under section 3(2)(B)(ii) of the Employee Retirement Income Security Act of 1974,

(G) under a cafeteria plan (within the meaning of section 125) if such payment would not be treated as wages without regard to such plan and it is reasonable to believe that (if section 125 applied for purposes of this section) section 125 would not treat any wages as constructively received,

(H) under an arrangement to which section 408(p) applies, other than any elective contributions under paragraph (2)(A)(i) thereof, or

(I) under a plan described in section 457(e)(11)(A)(ii) and maintained by an eligible employer (as defined in section 457(e)(1));

(6) the payment by an employer (without deduction from the remuneration of the employee)—

(A) of the tax imposed upon an employee under section 3101, or

(B) of any payment required from an employee under a State unemployment compensation law, with respect to remuneration paid to an employee for domestic service in a private home of the employer or for agricultural labor;

(7)

(A) remuneration paid in any medium other than cash to an employee for service not in the course of the employer's trade or business or for domestic service in a private home of the employer;

(B) cash remuneration paid by an employer in any calendar year to an employee for domestic service in a private home of the employer (including domestic service on a farm operated for profit), if the cash remuneration paid in such year by the employer to the employee for such service is less than the applicable dollar threshold (as defined in subsection (x)) for such year;

(C) cash remuneration paid by an employer in any calendar year to an employee for service not in the course of the employer's trade or business, if the cash remuneration paid in such year by the employer to the employee for such service is less than $100. As used in this subparagraph, the term "service not in the course of the employer's trade or business" does not include domestic service in a private home of the employer and does not include service described in subsection (g)(5);

(8)

(A) remuneration paid in any medium other than cash for agricultural labor;

(B) cash remuneration paid by an employer in any calendar year to an employee for agricultural labor unless—

(i) the cash remuneration paid in such year by the employer to the employee for such labor is $150 or more, or

(ii) the employer's expenditures for agricultural labor in such year equal or exceed $2,500, except that clause (ii) shall not apply in determining whether remuneration paid to an

employee constitutes "wages" under this section if such employee (I) is employed as a hand harvest laborer and is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (II) commutes daily from his permanent residence to the farm on which he is so employed, and (III) has been employed in agriculture less than 13 weeks during the preceding calendar year;

[**(9)** Repealed. Pub. L. 98–21, title III, § 324(a)(3)(B), Apr. 20, 1983, 97 Stat. 123]

(10) remuneration paid by an employer in any calendar year to an employee for service described in subsection (d)(3)(C) (relating to home workers), if the cash remuneration paid in such year by the employer to the employee for such service is less than $100;

(11) remuneration paid to or on behalf of an employee if (and to the extent that) at the time of the payment of such remuneration it is reasonable to believe that a corresponding deduction is allowable under section 217 (determined without regard to section 274(n));

(12)

(A) tips paid in any medium other than cash;

(B) cash tips received by an employee in any calendar month in the course of his employment by an employer unless the amount of such cash tips is $20 or more;

(13) any payment or series of payments by an employer to an employee or any of his dependents which is paid—

(A) upon or after the termination of an employee's employment relationship because of (i) death, or (ii) retirement for disability, and

(B) under a plan established by the employer which makes provision for his employees generally or a class or classes of his employees (or for such employees or class or classes of employees and their dependents), other than any such payment or series of payments which would have been paid if the employee's employment relationship had not been so terminated;

(14) any payment made by an employer to a survivor or the estate of a former employee after the calendar year in which such employee died;

(15) any payment made by an employer to an employee, if at the time such payment is made such employee is entitled to disability insurance benefits under section 223(a) of the Social Security Act and such entitlement commenced prior to the calendar year in which such payment is made, and if such employee did not perform any services for such employer during the period for which such payment is made;

(16) remuneration paid by an organization exempt from income tax under section 501(a) (other than an organization described in section 401(a)) or under section 521 in any calendar year to an employee for service rendered in the employ of such organization, if the remuneration paid in such year by the organization to the employee for such service is less than $100;

[**(17)** Repealed. Pub. L. 113–295, div. A, title II, § 221(a)(19)(B)(iv), Dec. 19, 2014, 128 Stat. 4040]

(18) any payment made, or benefit furnished, to or for the benefit of an employee if at the time of such payment or such furnishing it is reasonable to believe that the employee will be able to exclude such payment or benefit from income under section 127, 129, 134(b)(4), or 134(b)(5);

(19) the value of any meals or lodging furnished by or on behalf of the employer if at the time of such furnishing it is reasonable to believe that the employee will be able to exclude such items from income under section 119;

(20) any benefit provided to or on behalf of an employee if at the time such benefit is provided it is reasonable to believe that the employee will be able to exclude such benefit from income under section 74(c), 108(f)(4), 117, or 132;

(21) in the case of a member of an Indian tribe, any remuneration on which no tax is imposed by this chapter by reason of section 7873 (relating to income derived by Indians from exercise of fishing rights);

(22) remuneration on account of—

(A) a transfer of a share of stock to any individual pursuant to an exercise of an incentive stock option (as defined in section 422(b)) or under an employee stock purchase plan (as defined in section 423(b)), or

(B) any disposition by the individual of such stock; or

(23) any benefit or payment which is excludable from the gross income of the employee under section 139B(b).

Nothing in the regulations prescribed for purposes of chapter 24 (relating to income tax withholding) which

provides an exclusion from "wages" as used in such chapter shall be construed to require a similar exclusion from "wages" in the regulations prescribed for purposes of this chapter. Except as otherwise provided in regulations prescribed by the Secretary, any third party which makes a payment included in wages solely by reason of the parenthetical matter contained in subparagraph (A) of paragraph (2) shall be treated for purposes of this chapter and chapter 22 as the employer with respect to such wages.